

12787

No. _____

Supreme Court of Illinois

Hamlin

vs.

Reymolds et al

71641  7

228

John R. Hawley

vs
James L. Reynolds

1859

228-113
Supreme Court

Hamlin
vs
Reynolds et al

Written Argument
for
Appellees

Filed April 26, 1839
L. Leland
Clerk

George Fayson
Counsel for Appellees

Be it remembered that on the 17th day of February A D 1858. James S Reynolds David J Ely Zebulon S. Ely and James A Parsons plaintiffs by George Payson their Attorney filed in the office of the Clerk of the court aforesaid their declaration against James R Hamlin defendant which is in the words and figures following. to wit:

State of Illinois
Cook County of Cook County Circuit Court
March Term A D 1858.

James S Reynolds David J. Ely Zebulon S. Ely and James A Parsons partners in trade in the City of Chicago County and State aforesaid under the name of Reynolds, Ely & Co plaintiffs in this suit by George Payson their Attorney complains of J. R Hamlin of De Kalb County defendant who is summoned to in a plea of trespass on the case on promises.

For that whereas one Edward Hamlin heretofore. to wit: on the eighteenth day of May A D 1857, at De Kalb. to wit: at Chicago aforesaid made his two certain promissory notes in writing bearing date the day and year aforesaid and then and there delivered said notes to the defendant in each of which said notes said Edward Hamlin promised to pay to the

order of the defendant Three hundred fifty two
 dollars without any relief whatever from any
 valuation appraisement or stay laws with
 interest to be added from date at ten per cent
 value received at the office of Reynolds. Ely
 & Co in Chicago and the first of said notes
~~were~~ made payable in sixty days the second
 one in ninety days after date and the said
 defendant then and there endorsed said note
 to the said plaintiffs and then and there
 delivered said notes to said plaintiffs. and
 the said plaintiffs commenced suit on said
 notes against the said Edward Hamlin
 at the September Term. of the Cook County
 Court of Common Pleas A D 1857 which was
 the first Term after the said notes fell due
 and obtained judgment at the November
 Term of said Court A D 1857 in said suit for
 both ^{said} notes - To wit: for \$739.08 and costs and
 execution was afterwards. to wit: at the said
 November Term of said Court issued out
 of said Court and under the seal thereof
 said judgment. directed to the Sheriff of said
 county of De Kalb. of which the said Edward
 Hamlin was a resident. and was delivered
 to said Sheriff at De Kalb aforesaid on the
 nineteenth day of December A D 1857 and was
 by him returned wholly unsatisfied no property
 found. to wit: at De Kalb County aforesaid. to

United States of America

STATE OF ILLINOIS, COUNTY OF COOK, S. S.

Pleas, before the Honorable

George Manicom

Judge of the Seventh Judicial Circuit of the State of Illinois, and Solo' Residing'
Judge of the Circuit Court of Cook County, in the State aforesaid, and at a term thereof
begun and held at the Court House in' the 'City' of Chicago, in' said' County, on' the'

Second Monday, (being the *Twelfth* day) of
April in the year of our Lord one thousand eight hundred and
Fifty Eighth and of the Independence of the said United States the
Eighty Second

Present, Honorable

George Manicom

Judge of the 7th Judicial

Circuit of the State of Illinois.

Charles Stuart

States Attorney.

John S. Wilson

Sherriif of Cook County.

Attest:

Wm L. Church

Clerk.

wit: at De Kalb Chicago aforesaid. to wit:
 On the twenty ninth day of January A D 1858
 wherefore by means whereof and by force of
 the Statute in such Case made and provided
 the said J R Hamlin became liable to pay
 said plaintiff the sum of money in said
 notes mentioned and being so liable in con-
 sideration thereof then and there undertook
 and promised said plaintiff to pay them
 said sum of money when thereunto afterwards
 requested. = And whereas also afterwards to
 wit: on the first day of February A D 1858. at
 De Kalb County aforesaid. Do-wit: at Chicago
 aforesaid the said defendant became and was
 indebted unto the plaintiffs in a large sum
 of money. Do-wit: One Thousand dollars for
 money lent and advanced by said plaintiff
 to said defendant at his request and for other
 money before that time had and received
 by said defendant to the use of said plaintiff
 Also for other money laid out and expended
 by said plaintiff for said defendant at his
 request. And being so indebted said defendant
 in consideration thereof then and there under-
 took and promised said plaintiff to pay
 them said sum of money when thereunto
 afterwards requested.

Yet the said defendant although
 often requested &c has not paid the said several

sums of money above mentioned or any of them to the said plaintiffs but has hitherto wholly refused so to do and still does refuse to the damage of the plaintiffs of One thousand dollars therefore they bring suit &c.

George Payson
Plffs atty

\$362. Chicago May 18. 1857.

Forty days after date I the subscribers of De Kalb County of De Kalb State of Illinois promise to pay to the order of J. R. Harulin Three hundred and sixty two dollars without any relief whatever from any valuation appraisement or stay laws with interest to be added from date at ten per cent at the office of Reynolds Ely & Co in Chicago value received

Edw. Harulin

"Endorsed Pay to order of Reynolds Ely & Co"
J. R. Harulin.

\$362. Chicago May 18. 1857.

Sixty days after date I the subscribers De Kalb County of De Kalb State of Illinois promise to pay to the order of J. R. Harulin Three hundred and sixty two dollars without any relief whatever from any valuation appraisement or stay laws with interest to be added from date at ten per cent at the office of Reynolds Ely & Co Chicago value received

Edw'd Hamlin
 "Endorsed Pay to order of Reynold. Ely & Co."
 J. R. Hamlin.

And afterwards. To-wit: on the Fourth day of March in the year last aforesaid the said defendant John R Hamlin by H. B. Hurd his attorney^{and} demurred and plea to the plffs said declaration which are in the words and figures following. To-wit:

James S. Reynold, David J.	} Court County Circuit Court March Vacation Term 1858.
Ely, Zebulon S Ely and	
James A. Parsons	
John R. Hamlin	

And now comes the said defendant by H. B. Hurd his Attorney and defends the wrong and injury when he said that the said first Count of the said declaration and the matters therein contained in manner and form as the same are above stated and set forth are not sufficient in law for the said plaintiffs to have or maintain their aforesaid action thereof against the said defendant ^{and the said plaintiff} is not bound in law to answer the same and thus he is ready to verify wherefore he prays Judgment Judgment and that the said plaintiffs be barred from having or maintaining

6 their aforesaid action thereof against him.

And as to the balance of said declaration (to-wit: all but the first count) the said defendant saith he did not undertake and promise in manner and form as the said ^{plaintiffs} ~~defendant~~ saith have above complained & of this he puts himself upon the Country &c

H. B. Ward
Defts Atty.

And afterwards, to-wit: On the Fifth day of March in the year last aforesaid the following among other proceedings in said Court were had and entered of Record therein, which is in the words and figures following. To-wit:

James S Reynolds David J.
Ely, Zebulon S Ely and
James A Parsons } Just.

12342

J. R. Hamlin

This day came the said plaintiffs and defendant and the Court being well advised on the demurrer of the said defendant to said plaintiffs declaration over the said demurrer and thereupon it is ordered that said defendant plead to said plaintiff declaration herein by Monday next.

And afterwards. Do = wit: on the sixth day of March the said defendant by his said attorney filed other certain pleas to the plaintiffs said declaration which is in the words and figures following. Do = wit:

James S. Reynolds Etal

vs } Cook County Circuit Court
John R. Hamlin } March Vacation Term A.D. 1858

And now come the said defendant by H. B. Hurd his Atty and defends the wrong and injury whereof and says he did not undertake and promise in manner and form as the said plaintiffs have above in their said declaration charged and of this he put himself upon the Country &c.

And for a further plea the said defendant saith acts now because he says that at the time of the suing out of the execution as charged in the said plaintiffs declaration and during all the time the said execution was in the hands of the Sheriff of De Kalb County Illinois and when the same was returned the said Edward Hamlin owned and possessed of and held in his own name a large amount of real estate and property in the said County of De Kalb Illinois sufficient to satisfy the execution of which the said plaintiff had notice and this the said defendant

4
is ready to verify wherefore he prays Judgment if
the said plaintiffs ought to have or maintain
their aforesaid action thereof against him &c

And for a further plea to the first Count
of the said plaintiffs declaration the said defen-
-dant says actis non because he says that at
the time of the suing out of the Execution men-
-tioned in the said plaintiff declaration. To-
wit: the Execution against Edward Hamlin
in favor of the said plaintiffs the said
Hamlin and the said were the owners in
their own names of a large amount of Real
and personal Estate and property. To-
-wit: sufficient to satisfy the said plaintiffs Execution
and that they the said Hamlin continued to
own hold and possess the said property and
real estate at the time the said Execution was
placed in the hands of said Sheriff and during
all the time the same remained in his
hands and at the time of the release of
said Execution and that said property was
during all said time in the County of
De Kalb and State of Illinois and was subject
and liable to execution all of which the said
Sheriff and said plaintiffs then and there
had notice but the said plaintiffs and said
Sheriff contriving and designing to harass
and defraud the said defendant and put him
to great Costs & trouble designedly and

9

fraudently had and caused to be returned
the said Execution "No property found" And
this the said defendant is ready to verify
wherefore he prays judgment if the said plain-
tiff ought to have and maintain their aforesaid
action thereof against him &c

H. B. Hurd

Defts Atty.

And afterwards = Do-wit: on the Ninth day
of March in the year last aforesaid the said
plaintiffs by their said attorney filed their demurrer
to the said defendant pleas which ~~is~~ ^{is} in
the words and figures following. Do-wit:

Reynolds Etal

Hamlin

Circuit Court Cook County
March Term A.D. 1858

And the said plaintiffs say that
the said first count and the matters therein
in manner and form as the same are above
stated and set forth are sufficient in law
for the said plaintiffs to have and maintain
their aforesaid action thereof against the
said defendant and the said plaintiffs are
ready to verify and prove the same as the Court
shall direct wherefore as the said defendant
has not answered the said first Count nor
^{hitherto} ~~heretofore~~ in any manner denied the same
the said plaintiff pray judgment and their

damages by reason of the not performing the said several promises and undertakings in the said declaration mentioned to be adjudged to them &c

George Payson

Plffs Atty

And afterwards - To-wit: on the sixteenth day of March in the year last aforesaid the said plaintiffs by their said Attorney files their replication and demurrer to the defendant's pleas which is in the words and figures following. To-wit:

State of Illinois
 Cook County } Circuit Court Cook County
 March Term A.D. 1888.

Reynolds Etal

vs
 Cornelin

} Demurrer & Replication

And the said plaintiffs as to the plea of the said defendant by him first above pleaded and whereof he hath put himself upon the country do the like

George Payson

Plffs Atty

And the said plaintiffs as to the second plea of the said defendant say that the same and the matters therein contained in manner and form as the same are above pleaded and set forth are insufficient in law to bar the said plaintiffs from having or maintaining their

aforesaid action thereof against him the said defendant and that the said plaintiffs are not bound by law to answer the same and this the said plaintiffs are ready to verify wherefore by reason of the insufficiency of the said plea in this behalf the said plaintiffs pray judgment and their damages by reason of the not performing of the said several promises and undertakings in the said declaration mentioned to be adjudged to them &c. = And the said plaintiffs according to the form of the statute in such case made and provided states and shows to the Court here the following Causes of demurrer to the said second plea that is to say that the defendant has not by his said plea traversed or denied or attempted to put in issue any matter of fact alleged by the plaintiffs but has introduced and attempted to put in issue matters of fact not alleged nor necessary to be alleged and that the plea is no answer to the said first Count but evasive and argumentative &c. And also that the said second plea is in other respects uncertain informal and insufficient &c.

George Payson
Plff atty

And the said plaintiff as to the third plea of the said defendant say that the same and the matters therein in manner and form as

the same are above pleaded and set forth are insufficient in law to bar or foreclose the said plaintiffs from having or maintaining their aforesaid action thereof against him and that the said plaintiffs are not bound by law to answer the same and thus the said plaintiffs are ready to verify wherefore by reason of the insufficiency of the said plea in this behalf the said plaintiffs pray judgment and their damages by reason of the not performing of the said several promises and undertakings in the said declaration mentioned to be adjudged to them &c. And the said plaintiffs according to the form of the Statute in such case made and provided state and show to the Court here the following Causes of demurrer to the said third plea. To-wit: that the defendant has not by his plea traversed or denied or attempted to put in issue any matter or fact alledged by the plaintiffs but has introduced and attempted to put in issue matters of fact not alledged nor necessary to be alledged and that the plea is no answer to the said first Count but evasive and argumentative &c. And also that the said third plea is in other respects uncertain informal and insufficient &c.

George Payson
Plffs Atty

And afterwards = Do wit: on the eighteenth day of March in the year aforesaid the following among other proceedings in said Court was had and entered of record therein, which is in the words and figures following, Do wit:

James S Reynolds	} Asst
David S. Ely	
James A Parsons.	

J. R. Hamlin

This day come the said parties by their Attorney and the Court after hearing Counsel on the demurrer of the said plaintiffs to the special pleas of the said defendant herein pleaded and being well advised in the premises, sustained said demurrer.

And afterwards = Do wit: at the April Term of said Court. Do wit: on the twenty sixth day of May in the year last aforesaid the following proceedings among others, were had and entered of record therein. Do = wit:

James S Reynolds	} Assumpsit
David S. Ely	
James A Parsons	

J. R. Hamlin :

This day, come again as well the said plaintiff by George Payson their attorney, as the said defendant by H. B. Hurd his Attorney, and issue being joined herein between the said parties, it is ordered that a jury come. Whereupon comes the Jurors of a jury of good and lawful men = To wit:

H. W. Phillips, O. H. Salisbury, D. Bloom
G. J. Ward, M. S. Nichol, A. Pierson
H. Barwell, H. B. Pike, A. Sutton
James Pitney, D. V. Pitney, M. A. Hitchcock

Who being each duly elected, tried and sworn well and truly to try the issue joined aforesaid, and after hearing the evidence, and the arguments of Counsel, as well on the part of the said plaintiff as of the said defendant, and the instructions of the Court, retire to consider of their verdict under the charge of a sworn officer of the Court, and afterward come in to Court and say "We the Jury find the issues for the plaintiff and assess their damages at Seven hundred and ninety Eight dollars and forty cent."

Whereupon the said defendant's Counsel moves the Court for a new trial of this cause, and the Court after hearing arguments of Counsel and being fully advised in the premises now overrule said motion of defendant for a new trial herein, to the

overruling of which said motion the defendant by his Counsel now here excepts.

Therefore it is considered by the Court, that said plaintiff do have and recover of the said defendant their damages of seven hundred and ninety eight dollars and forty cents, in form as aforesaid by the Jury aforesaid assessed together with their costs and charges by them about their suit in the behalf expended and have Execution therefor.

And thereupon the said defendant prays an appeal to the Supreme Court, of the State of Illinois Which is granted upon condition that the said defendant executes and files the appeal Bond herein in a penalty of One Thousand six hundred dollars and conditioned according to law, with

his sureties to said Bond. And on motion Eight days given the said defendant to file his bill of exceptions herein.

And afterwards. Do wit: on the Second day of June in the year last aforesaid the said defendant by his said Attorney filed @ bill of exceptions which is in the word and figures following. Do wit:

Be it remembered that on the 26^d day of May A D 1858 at the April Term of

paid year in the Cook County Circuit Court the cause therein pending wherein James S. Reynolds David J. Ely & Nelson S. Ely and James A. Parsons were plaintiffs and John H. Hamlin was defendant come on to be tried before Honorable George Mainwaring Judge of said Court and a jury. Upon said trial the plaintiff offered the following evidence.

- 1st The notes of Edward Hamlin endorsed by said defendant in words and figures following
 To-wit:

\$362. Chicago May 18. 1857.

Thirty days after date I the subscriber of De Kalb County of De Kalb State of Illinois promise to pay to the order of J. R. Hamlin Three hundred and sixty two dollars without any relief whatever from any valuation appraisement or stay laws with interest to be added from date at ten per cent at the office of Reynolds Ely & Co. in Chicago value received

Edward Hamlin

"Endorsed Pay to order of Reynolds Ely & Co."

\$362. Chicago May 18. 1857.

Sixty days after date I the subscriber De Kalb County of De Kalb State of Illinois promise to pay to the order of J. R. Hamlin

17

Three hundred and sixty two dollars
without any relief whatever from any
valuation appraisement or stay laws with
interest to be added from date at ten per
cent at the office of Reynolds Ely & Co Chicago
value received.

Edward Hamlin

"Endorsed Pay to order of Reynolds Ely
& Co." J. R. Hamlin.

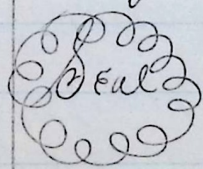
2nd Execution in the case of said plaintiffs
against Edward Hamlin in the Cook
County Court of Common Pleas. & the return
thereon in words and figures following
To-wit:

State of Illinois } ss
County of Cook }

The People of the State of
Illinois to the Sheriff of De Kalb County
Greeting:

We command you, that of the land
and tenements, goods and chattles of
Edward Hamlin defendant in your county
you cause to be made the sum of Seven
hundred and thirty nine dollars and
eight cents which James S. Reynolds
David J. Ely Zebulon S. Ely and James
A. Parsons plaintiffs lately in the Cook
County Court of common Pleas of said County

at a special term thereof begun and held at Chicago in said County on the 2nd Monday of November last past, recovered against the said defendant and which by the said Court was adjudged to the said plaintiff for their damages. = And also the further sum of Fifteen dollars and thirty cents which were adjudged to the said plaintiffs for their costs and charges in that behalf expended, whereof the said defendant was convicted, as appears to us of record. = And have you there monies ready to render to the said plaintiffs for their damages and costs aforesaid, and make a return of said writ with an endorsement thereon in what manner you shall have executed the same, in thirty days from the day from the date hereof. =



Wm. Walter Kimball, Clerk of
our said Court and the seal thereof.
at Chicago, in said County, this 9th
day of December A.D. 1857.

Walter Kimball, clerk

Rec^d. this Exec. this 19th day of Dec. 1857, at 3 O'clock P.M.

I return this writ not satisfied this 29th
day of Jan 1858 (No property found.)

Fees Service 50.

Mileage & Return 50

1.00.

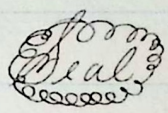
S. J. Appen Sheriff of
De Kalb Co

It was admitted that said execution

was issued upon a valid judgment duly
 recovered ^{at the first possible term after the said notes fell due} on the said notes sued upon in
 this suit at the time and in the court
 as set forth in said execution. = This was
 all the evidence introduced in this cause
 = The case thereupon being submitted to the
 jury they retired and returned the following
 verdict. "We the jury find the apes for the
 plaintiffs and apes their damages at Seven
 hundred and ninety Eight dollars and forty
 cents" Whereupon the said defendant moved
 for a new trial which motion was overruled
 by the court. As which overruling of said
 motion the said defendant excepted Where-
 upon the said court entered the following
 judgment. Therefore it is considered by the
 court that said plaintiffs do have and rec-
 = er of the said defendant their damages of
 Seven hundred and ninety Eight dollars
 and forty cents in form as aforesaid by the
 jury aforesaid apessed together with their
 costs and charges by them about their suit
 in this behalf expended and have execution
 therefor. And the said defendant prayed
 an appeal to the Supreme Court which
 was allowed on the said defendant entering
 into bonds in the sum of sixteen hundred
 dollars with J. V. Waterman & William
 J. Hornet as sureties in eight days from

the said twenty sixth day of May which said bond is duly approved and filed.

Given under my hand and seal this 5th day of June 1858 one of the days of the April Term of said court.

George Manierre 
Judge of 7 Judicial
Circuit Ills

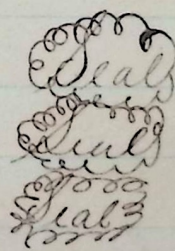
And afterwards. To-wit: on the Second day of June ^{A D 1858} the said defendant filed his appeal Bond which is in the words and figures following. To-wit:

Know all men by these Presents, that we John R Hamlin, J. V Waterman and William J Hunt of the County of De Kalb and State of Illinois, are held and firmly bound unto James S Reynolds David J Ely Gebulon S Ely and James A Parsons, all of the same County and State, in the penal sum of Sixteen Hundred dollars lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly, Severally and firmly, by these presents. Witness our hands and seals this twenty eighth day of May A D 1858. The condition of the

above obligation is such. that whereas the said James S Reynolds David J. Ely Gehlen S Ely and James A Parsons did on the twenty sixth day of May A D 1858. in the Circuit Court in and for the County and State aforesaid. and of the April Term thereof A D 1858 recover a Judgment against the above bounden John R Hamlin for the sum of Seven hundred and ninety Eight dollars and forty cents beside costs of suit: from which said Judgment of the said Circuit Court, the said John R Hamlin has prayed for, and obtained an appeal to the Supreme Court of said State.

Now, therefore if the said John R Hamlin shall duly prosecute his said appeal with effect, and moreover, pay the amount of the Judgment, costs, interest and damages rendered, and to be rendered against him in case the said Judgment shall be affirmed in the said Supreme Court, then the above obligation to be void: otherwise to remain in full force and virtue.

J R Hamlin
J. V. Waterman
William J. Hambl



It is admitted that the
judgment was reversed at
the first term of court after
the note became due and as soon
in the term as could be done. N.B. Hurd
Supt. Ill.

State of Illinois

Supreme Court
April Term A.D. 1839

John R. Hamilton
v
James L. Reynolds, et al.

And now comes the said John
R. Hamilton (plff) by Harvey B. Hurd his attorney
and says that in the record and proceedings
aforesaid & in the giving the judgment aforesaid
there is manifest error in this

1st That the Court erred in overruling the
demurrer of defendant below

2nd That the Court erred in sustaining
plaintiff (below) demurrer to defendant's 2nd
3^d Pleas.

State of Illinois, }
COUNTY OF COOK. } s. s.

J. WILLIAM L. CHURCH, Clerk of the Circuit
Court of Cook County, in the State aforesaid, do hereby
certify the above and foregoing, to be a true, perfect and complete
copy of the pleadings papers & proceedings
in a certain cause Calley pending in said Court on the
Common Law side thereof, wherein James S.
Reynolds et al were Plaintiff and
John R. Hamilton was defendant

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed the seal of our
said Court at Chicago, this Eighth day of March A. D. 1889

Recd for Record \$ 5⁶⁵

Wm L. Church
Clerk.

228

John R. Hamlin
vs
James L. Reynolds & als
Record

Filed April 20. 1839
L. Leland
Clerk

23

3^d There is a variance between declaration & proof The declaration stating that the Ex or Edward Huntin was issued in Nov June 1859 & the proof showing it to have been issued Dec 9th 1859.

4th In refusing a new trial

5th The proof was insufficient to warrant a
verdict.
S. B. Hunt

Offs. Atty.

The said plaintiffs by George Tappan their
attorney join in error as above on the issues tendered this second day of April A.D. 1859
George Tappan

Offs. Atty.

The court will please take notice that the printed abstract furnished by the appellant in this case does not present the evidence quite so distinctly and fully perhaps as it might have done, in one or two particulars; and the court are therefore respectfully referred to the written transcript where the facts appear more at length. This discrepancy was entirely unintentional we have no doubt, and was not discovered till too late for correction.

The printed abstract merely states that it was admitted that the execution was issued upon a judgment "duly" recovered. The written transcript shows more fully what was meant by the word "duly", & that the judgment was obtained at the first possible term after the notes fell due, and as soon as possible in that term. That is, that there was no lack of diligence in obtaining the judgment, but that up to that time the plaintiffs had shown due diligence.

Supreme Court of Illinois
Of the April Term AD 1859

J R Hamlin Defendant & Appellant

vs

Reynolds et al Plaintiffs & Appellees

For the appellees it is respectfully
suggested -

1. That no question is before this
court upon demurrer, and
the first and second assign-
ment of error are therefore
bad.

10. There is nothing upon record to show
that the defendant below excepted to
the decision of the Circuit Court in
overruling the defendants, or in sustain-
ing the plaintiffs' demurrer; nor did said
defendant in fact except to either of said
decisions.

The defendant cannot therefore assign
those decisions for error now. 2 Gil. 293;

11. The defendant, by pleading over, abandon-
ed his demurrer, and is thus barred from as-
signing such error. Snyder - Gaither 3 Scam. 92.

nor (11^o), is it of any consequence whether the defence to the plea was rightly sustained or not, since the plaintiff afterwards obtained a verdict on all the counts, and the money counts are certainly good. Warner - Crane 20 Ill. 151.

II. As to the variance between the declaration and proof, no error can be found; for

(10) If the special count were insufficient on this ground, the money counts are not liable to any such objection; and
(11^o) The execution, which is a part of the record, and was offered in evidence, shows that there was a special term of the Cook County Court of Common Pleas commencing on the second Monday of November, & there is no presumption that the same term did not continue till the ninth day of December following. There is certainly no proof of variance.

(XII) The court will take judicial notice of the time of the Circuit Court.

November term - the proof is that it issued on the
ninth day of December. Now in order to make out
a variance it must be shown that that day
was no part of said term, which is not true.
A variance is alleging one thing and proving
the contrary - but here the most that can
be said is that the evidence is not so pos-
itive and conclusive as it might have been.

After verdict however the court will pre-
sume that the missing ~~link~~ link was sup-
plied at the trial, as was in fact the case
in this instance. If the court will presume af-
ter verdict that certain things were proved which
were not even alleged, it will certainly presume
that all was proved that was alleged, when

There is a necessary implication to that effect.

Now in this case the only evidence of the former suit and of the proceedings ^{it,} under, was contained in the records; of course then the same records must have proved that the judgment was recovered at the November term. And the fact is that this was proven for the records of the former suit were all brought before the jury. Nor could the judgment have been proved, without proving at the same time the time when it was recovered.

If the objection to the sufficiency of the evidence was not taken at the trial, it cannot be taken here, if it was such as might have been removed by further

III. The only remaining question is whether the evidence is sufficient to sustain the verdict; for if it is sufficient, the circuit court committed no error in refusing a new trial, and the judgment must stand.

(1.) The sheriff's return is conclusive between third parties, and especially when occupying the position of sureties or indorsers.

Lewis v Blair 1. N. Hamp. 68, holds the true rule to be that the truth of the return cannot be called in question to invalidate his proceedings, or defeat any right acquired by means of them.

Harkness v Farley 11 Maine 493-4; *scire facias* is the indorser of a writ. A return that the officer could find no property within his precinct is conclusive as to his insolvency in that precinct, and *prima facie* evidence of insolvency *outafit*.

Gray - Fessenden 21 Maine 34; and Bamford v Melvin 7 Maine 18-21; The first against indorsers of a writ, the second proving out of

the extent of an execution and an appraisement
McKeen v. Gammon 33 Maine 190-1 and Bolt v.
Burnell 11 Mass. 165, are cases of the same sort
~~Stevens v. Bigelow 12 Mass. 425 is a case on the~~
viability of writ

See also Bolt v. Burnell 9 Mass. 98; Estabrook
v. Hapgood 10 Mass. 314; Clayton v. Inhabitants
of Chester 4 Mass. 478;

The rule of law then being well settled
that the Sheriff's return, as to all matters ma-
terial to be returned, cannot be impeached
in an action between third parties, we
have the following facts conclusively
established.

That the suit against the maker was
commenced and judgment recovered at the
earliest possible term of court after the
notes fell due - that the execution is-
sued on said judgment at the same
term, and without unnecessary delay,
was sent at once to the Sheriff of Le
Kalt county, and returned by him un-
satisfied, no property found, at the end
of forty three days.

This is all the evidence in the case, and the question is whether it is so palpably insufficient as to lead this court to grant a new trial on that ground alone.

This question divides itself into two: First, Is this evidence sufficient to show due diligence? Second, Is it sufficient to show the maker's insolvency? For it is evident that, if sufficient for either of these purposes, the verdict is agreeable both to law and equity, and will not be disturbed.

First; then, Is the evidence sufficient to show due diligence?

If not, it must be because the execution was returned by the sheriff in less than ninety days; for in every other particular the proceedings are beyond attack.

Is then the fact that the execution was returned in forty three days final and conclusive evidence of the want of that diligence required by the statute? If it is conclusive, this settles this whole case, so far as it depends on the prosecution of a suit against the maker.

But we maintain that it is not conclusive, and for the following reasons.

If the appellant maintains this to be the case it must be on one of the following grounds.

1° Because it is so declared by the statute, or necessarily implied.

Or 11° Because of the construction put by the courts of this and other states upon this or analogous statutes.

111° Because our laws have fixed the return of executions at ninety days.

1V° Because there must be some limit as to time, and this seems the most natural.

1° As to the statute on negotiable instruments, nothing is expressed on this point nor can anything be implied. It calls only for due diligence, but there is not one word to show what due diligence may be. This is a matter left entirely to the court.

11° The construction put upon a ^{somewhat} similar statute by the courts of Kentucky would undoubtedly lead to the conclusion that it was not due diligence to return the writ in less than ninety days. But the decisions of those courts have

never been ~~regarded~~ as authority in this state, and are in fact every where regarded as alike contrary to policy and good sense. It is difficult to see how under such a system the unhappy assignee should ever have the patience and perseverance, even if he lived long enough, to prosecute his remedy against the assignor to final satisfaction. So many and formidable are the difficulties there thrown in his way, that it would seem to be the express purpose of the courts entirely to discourage all suits of that description.

In Virginia, on the other hand, an entirely different construction is put upon this statute, and far less is required of the assignee.

Bank of United States vs Lifer 4 Peters 366.

In our own state the courts have adopted a middle course, alike removed from the stringency of the decisions in Kentucky, and the indulgence shown the assignee by those of Virginia.

Thus this court has decided that it is sufficient to issue execution to the county where the maker resides, and that it need not issue to any other county, unless the assignee is aware of his having property in such county; Bestor v Walker 4 Gil. 14;

that execution need not issue at all, even after judgment if the maker is then found to be insolvent. It. 12; that no suit need be brought when the maker's goods are covered by a chattel mortgage Pierce & Short 14 Ill. 146; that the assignee need not go into chancery Medsco & Graves 4 Scam. 386; that he need not sue out a Ca. Sa. against the maker; Cowles & Litchfield 2 Scam. 356; that recovery of judgment at the first term, execution issued and returned "nulla bona", is evidence of due diligence; Ibid.

If the case last cited is to be regarded as an authority, it seems decisive of that now before the court; and it was so regarded by the court below, both as to the declaration and the evidence.

In one of the earlier cases, indeed, it was held that the assignee must exhaust every remedy the law allowed him against the maker; and in another that he must use the same means which a man of ordinary prudence would employ when he had no recourse against any other party.

But it is evident that neither of these rules is to be understood literally; for, as to the first, it would be impossible

ever to exhaust all the remedies of the law; and, besides, the cases cited above clearly show that there are many remedies, and those not the least efficient, which the assignee need not apply at all.

And, as to the second rule, the question at once arises what diligence would a man of ordinary prudence employ, where he had no recourse against any other party? If the debt were small, he would be soon convinced of the prudence of giving it up for lost. If it were very large, then indeed he would, as far as he could, exhaust all the remedies of the law. He would be careful to keep his judgment in good condition; he would issue his executions as often and wherever he had any fair hope of success; - he would sue out his garnisher process, file his bill in equity, and conclude, perhaps, with a ne exeat or capias ad satisfaciendum. "So reasonable man, seeking to protect his own interest," which are the words of the court, would do less than this, in a proper case; yet, as we ^{have} seen above, the assignee need do none of these things. He need not go into chancery - he need not arrest the maker - he need not go out of the maker's county - he need not

issue an alias execution - he need not harass third parties, unless the knowledge that they have funds in their hands is brought fully home to him, and perhaps not even then.

It is clear then that this court, when it laid down the above rules, intended them to be taken with many grains of allowance. It is equally clear that the court did not intend to establish one rigid and unvarying law for all cases, but a law that might be applied without violence to the different circumstances of each case.

So that, after all, the only rule to be drawn from the decisions of this court up to this time, the only rule, I mean, touching this particular point, is this, that the test of diligence is not always the same - that it varies with the varying facts.

And that this rule is the only true and safe one is perfectly plain. Due diligence in one case would be gross negligence in another. One man might ~~obtain~~ sue out a dozen executions, and yet do it so negligently as to effect nothing after all; while another, by his superior activity and ~~energy~~ capacity, might collect his debt with one. To attempt then to measure diligence by the number of executions, or by

the time they are in the hands of the Sheriff would be in vain. The standard is too imperfect. Nor is there anything in the decisions of this court to favor such a rule. The tendency is decidedly the other way.

There are other statutes however regarding matters somewhat similar to this, where it is said, the rule of practice is well defined. The laws concerning bail are of this class; and as, in order to charge the bail, it is necessary that the execution should not be returned till the last day, it is maintained that the same course must be followed in order to charge an indorser.

But, in the first place, the position of the bail is so unlike that of an indorser that no argument founded on this ground is entitled to any great consideration. The bail does not himself owe the debt. He is simply a surety, and as such to be favored. The express condition on which he assumes his liability is that the creditor shall first pursue the debtor. This is his bargain, and this is the only consideration he receives. Of course if the con-

situation fails he is freed from his liability

But the indorser is always, in execution =
place of law, and generally in fact, as
much a debtor as the maker himself. He
does not assume any liability simply as an
act of kindness, but for good and valuable
considerations. He ought properly to be
held to a far stricter responsibility.

And if we examine the law on this point
a little further we shall find

But, in the second place, if we examine
the law concerning bail a little further, we
shall find this fancied analogy growing
less and less at every step. The execution
must not be returned till the last day,
but it need not be issued for years after
judgment - it need not be given to the
sheriff till long after it is issued - it is e=
nough if it be in his hands long enough
before the return for him by diligent in=
quiring to have a reasonable time and
opportunity to find the principal.

Stevens v Bigelow 12 Mass. 435.

This is enough to show that there is no
real analogy between the laws on these sub=
jects. The liability of bail and indorsers is ~~not~~
governed by principles totally diverse. And
if we must wait till the return day of the

execution before proceeding against the
indorser, because that happens to be the rule
in regard to bail, why should we not with
equal force and propriety extend the analogy
through all its parts, and thus hold the indor-
ser; though execution did not issue till
months or years after judgment? In fact,
this would be a far more logical deduc-
tion than the other; since the rule requiring
the execution not to be returned before the
return day is purely arbitrary and accident-
al, nothing whatever being gained by it either
to the bail or any other ~~other~~ party, whereas
the rule that he must hold it long enough
to make inquiry, is ~~better~~ founded ^{both} on reason
and justice.

III^o. Our statute has fixed the return day of executions at ninety days, and it may be said that it is not due diligence to return them sooner.

But the statute does not say, that they shall not be returned sooner. All it requires is that they shall be returned as soon as there is no penalty for returning them sooner, and no ~~law enforcing~~ such summary remedy given as in cases where the sheriff neglects to return them at the end of the ninety days. The statute says that all summonses shall be returnable on the first day of the next term, but they are much oftener returned before that day. And so with executions, if satisfied before the return day, they are returned at once; and no one ever supposed any law was disregarded by so doing.

IV. As to the next reason why the writ should be returned in ninety days, viz, that there must be some limit as to time and this seems the most natural, I confess, at first sight, it has ~~no~~ small weight. On closer scrutiny, the ^{rule} will be found, however, to have only one advantage, and that is its simplicity, and the consequent ease with which it can be applied. But even this advantage is more apparent than real, since we are even then obliged to take into the account a variety of other circumstances in order to a final decision of the question of diligence, just the same in fact as if we had no limit of time at all.

But, it will be said, we must have some limit, it would never do to suffer the writ to be returned at once, in a day or two days, for instance; what rule can we have better than that which fixes the time at ninety days?

About this I think there need be no difficulty. Let the sheriff keep the writ in his hands long enough to make demand of the maker, and effect the necessary search upon the records, and inquiries among the defendant's acquaintance. Having done this, why should he retain the writ any longer? He can do all this as well in forty days

as two hundred, if he does his duty, as every man is presumed to do, he does it all in much less time even than forty days, and after that the only diligence he is guilty of is keeping the writ idle in his pocket book until the ninety days have rolled round and he can return it according to law. In the great majority of cases all that is done is simply to make a demand, & if the debtor denies having property, that is an end of it? Yet he must keep it the whole three months, or it is not showing the diligence required to charge the indorser. He must do this too though the indorsee knew, at the time of commencing suit, that the maker had no property, but on account of the difficulty of proving it preferred rather to proceed by the slower but surer process.

No practical inconvenience would be found in such a rule as is here suggested. If the maker really had property, and the assignee by reasonable diligence could have found it, that might be shown by way of defence as well as now. There would be no danger of collusion between the assignee and the sheriff, for there could be no motive for such collusion. No man having prosecuted

one suit to maturity, having paid one set of costs, and one of attorneys fees, would willingly abandon it in order to commence another.

As a general rule it will take a month, or six months, in the greater part of the state to obtain judgment against the indorser even when no defense is made. But in the great majority of cases a defense is made. It is the natural and necessary effect of such a law to encourage a defense. And if a defense is ⁱⁿ put, it will take at least a year to obtain a judgment in the circuit court, to say nothing of the danger of having the judgment reversed on error, owing to some oversight on the part of the attorney, or his unavoidable ignorance as to some point of this law not yet determined by the Supreme Court.

Is it likely then that any creditor would needlessly and foolishly expose himself to such a hazard?

If, however, the assignor sees or thinks he sees any danger of the debt finally coming upon himself, owing to the sheriff, not finding property of the maker, he can almost always secure himself by giving the officer notice of any property in his knowledge. So is it exacting any too much of him to require that he should do this.

He is in privity with the maker. He received the note from him - He is bound to know and generally does know far more about the maker's property than the assignee. He holds the maker out, when he negotiates the note, as able and willing to pay it at maturity. It is his duty to see that the maker does pay it, or, at all events, to render all the assistance that his superior knowledge puts in his power.

And if he withholds such knowledge till he himself is sued, and then for the first time makes use of it as a defence, is it not to say the least turning the law into an instrument of oppression? And when the maker and indorser are arm brothers, and living in the same neighborhood, the injustice of such a defence becomes still more apparent.

In cases of this kind the argument =

afford
rearing
? Seam. 244

run ab inconvenientia is of great weight. And it is not difficult to see on which side the inconvenience is greater.

In nine cases out of ten the Sheriff will find property the first month, or he will not find any at all. Yet, for the very small chance of finding property in the last days of the execution, the assignee is expected to wait week after week before proceeding against the assignor, who in the meanwhile is too often employing the delay, thus obtained for him, by putting his property out of his hands, or seeking other means to hinder and finally defeat the assignee.

In short, the rule above proposed seems better fitted than any other to do justice to both parties. If the maker really has no property, clearly no injury is done the assignor by ~~de-~~turning the writ; if the maker has property, that fact may be shown in defence. And so it might have been shown, if time, in the present case. It was owing to the defendants neglect alone that no attempt was made to show this, ~~supposing~~ it could have been shown.

Finally, admitting that the writ ought not to be returned till ninety days, but the Sheriff for some reason of his own chooses to return it sooner? Is that the negligence of the plaintiffs? If he sees fit to return it, they have no power to prevent, they have done all they could. Why should they suffer for his negligence?

As the case of Nixon v. Wehrich 20 Ill. 600, has been cited; I would simply observe that there is nothing in that decision at variance with the principles above advocated. No objection was there made to the evidence showing that the maker had property, nor was the sheriff's return relied on as conclusive. Of course, if the evidence was admitted, it must have the force there given it. But in this case no evidence was offered, and the return was

insisted upon as conclusive. What was decided in that case was, that "if the plaintiff, by reasonable diligence, might have known of property of the maker sufficient to satisfy the debt, then he could not recover." But that has plainly nothing to do with this case, as there was

not a particle of evidence to show either that there was property, or that the plaintiff might have known of it.

If the demurrer were before this court, it would be different, but they are not.

I have dwelt the longer on this branch of the argument, not because I consider it essential to the case, but because it is my deliberate opinion that the law is of mischievous tendency and must continue so after all that the judiciary can do to relieve it.

This law was either framed for the benefit of the assignor, or to diminish litigation. But whichever of these was its object, it has signally failed to accomplish it.

It certainly has not diminished litigation, but rather increased it. The assignor no longer looks upon the debt as his. He is indignant at being called upon to pay

it. He thinks no means which the law allows too violent or dishonourable to escape the obligation. He will seldom pay if he can help it; and, thanks to the uncertainty of the law, he can almost always help it if he pleases.

Nor is the assessor really benefitted by the law. His liability to be sure is less than under the old law, but is this an advantage? Or, if an advantage, has it not been purchased at too dear a price? By not giving any note at all his liability would be diminished still farther, or entirely lost. But must men find it convenient to give notes now and then in the course of trade, and very few, I apprehend, would feel obliged for a law that forbid them to incur such liability. And the more readily his notes circulate, or the more they are considered worth, the better is his credit, and the greater are his facilities for doing business. Credit in this country is so essential to all classes of the business community that as a general rule a man who has lost it or never had it may as well shut up his shop at once. And this is so well known, that the first object with every one is and should be to make his credit good, the second to keep it so.

Yet the practical operation of this law is to weaken credit. The trader, who has to buy, and offers an indorsed note in payment, is met by the objection. "This indorser may be very good, but we must see the maker before we can reach him, and thus have all the expense and trouble of two suits, and, more likely than not, lose our money by the delay." That this, or something like this, is the almost universal experience cannot be denied.

There are some of the necessary evils of the law. And every decision exacting anything more of the assignee is a fresh evil, not only to him, but to the assignor himself, and to every man in the community.

The assignor is not a party - he is an original debtor and should be treated as such. He would then be more careful as to notes which he indorsed, he would do more to help the assignee to collect of the maker; this species of paper would be worth more than it now is, and circulated with greater confidence, and at the same time with greater safety.

But, Secondly; granting, for the moment, that the evidence is insufficient to show due diligence, there can be no question as to its sufficiency to show insolvency, and consequently the verdict must be supported on this ground.

The evidence under this head is the same as that offered to prove due diligence; viz, judgment at the first term, execution issued and returned wholly unsatisfied, no property found.

Numerous cases decide that this is proof of insolvency, conclusive proof as to the particular county to which the writ issued, prima facie proof as to all others. And being a record, it must necessarily be entitled to some weight as evidence, as much weight at least as, in the absence of all rebutting evidence, to make out a prima facie case in all cases, and throw the burden of proof upon the defendant.

Numerous cases, as I have said, decide this to be the law; but I need cite only one or two. *Boston v Walker* 4 Hil. 13; *Darkness v Farley* 11 Maine 493-4;

The insolvency, then, being sufficiently proved to exist at the earliest moment when a recovery was possible, the plaintiffs are clearly entitled to a verdict on this ground, and were not bound to prosecute their suit any farther. This is not only clear on principle, but is fully sustained by this court in the case of *Boston v Walker* 11 Hil. 12, ¹² already cited. The court then say that the assignee "will be excused from bringing out any execution ~~process~~, at all, if such process would prove wholly unavailing; precisely as, for the same reason, he would be excused from commencing suit."

But if execution need not issue at all, because of the maker's insolvency, there is still less reason for keeping it in the sheriff's hands ninety idle days, under the same state of facts. To say that execution need not issue at all, but that having, out of abundant caution perhaps, been sent to the sheriff, it must not be returned till the last moment, is clearly absurd. But I beg pardon of the court

for dwelling so long on this point; and hasten to consider the next question, which is, under which count in the declaration (this evidence of insolvency is to be admitted.

There are only two counts, ~~the~~ ^{one} special, and the ordinary money counts. If either of them is sufficient, the verdict must stand. First, as to the special count.

It is admitted that this count is defective in form; and, if the defendant had stood by his demand, final judgment would perhaps have been given in his favor. But after verdict the rule is less stringent.

"If the issue joined be such as necessarily required proof on the trial of the facts so imperfectly stated or omitted, and without which it is not to be presumed either that the judge would direct the jury to give, or that the jury would have given the verdict, such defect or omission is cured by verdict" 1 Chitty 673.

Now all that is demanded by this rule is to be found in the present case. 1° The issue joined was such as necessarily required proof of the facts so imperfectly stated or omitted; viz, proof of the maker's insolvency. 2° Without such proof, it is very certain that neither would the judge have ~~directed~~ directed the jury to find, nor would

The jury have found the verdict.

And if the count had in fact contained the fullest possible allegations of insolvency, precisely the same evidence would have been offered, and would have been simply sufficient, in the want of any rebutting evidence, to sustain the verdict.

The count should have alleged insolvency - it does not allege this, but it does allege the facts which prove insolvency, and though this is a defect in pleading, it is simply formal and is cured by verdict.

In *Russell v. Whitridge* 4 Scam. 12 the court say "Whether the declaration contains a sufficient cause of action we are not called upon to decide. The defendant, by abandoning his demurrer and pleading to the declaration, admitted its sufficiency; and it was only necessary for the plaintiff to prove the material averments in it to obtain a verdict."

The defendant (by pleading over after his demurrer was overruled) has waived all objection to the declaration. *Harman v. Thornton* 2 Scam. 354⁻⁵

"The defendant having taken issue on the facts contained in the declaration, it was sufficient for the plaintiffs by proof to sustain the material averments therein, and they could not be called on to prove more". *Humphries v. Collier*. 1 Scam. 52.

But in the second place, even admitting the defect in the special count to be substantial, and not cured by verdict, this does not alter the case.

For, in addition to the special counts, the declaration contains the money counts, about which there is no dispute - The defendant has joined issue on the whole declaration - There was a trial on this issue, and a verdict for the plaintiffs on all the counts.

At common law this might have been error; but by our statute one good count is enough.

The only question then remaining is this; Is ^{the} evidence in this action admissible under the common counts?

And here also we meet with no difficulty. This court, ^{and others} have again and again decided that written contracts could be given in evidence under the common counts, and that too in contracts quite as special as that on which this action is founded.

Thus it was held in *Snyder & Baithers* 3 Leam. 91 that the common counts were enough to sustain the verdict. The action was on a written guarantee, which was

specially pleaded, but finally admitted under the common counts. So in *Lewinshead & Jernison v Howard* 724, which was a case very similar to the present, it was held, as a matter of course, that a special contract could be offered under the common counts.

And there are scores of cases showing that a promissory note can be offered under these counts in suits between the indorsee and indorser, or indorsee and maker. See 1. Chit. 341 note 1. These cases, to be sure, refer to the law formerly in force as to indorsements, but they are none the less in point. The contract, into which the indorser entered, was just as special and just as much the creature of statute as under our own law, and there was just as much reason for rejecting such evidence then as now. II Green Evid. § 104, 112

See also *Lane v Adams* 19 Ill. 167 which was an action on a note by the ~~payee~~ payee vs the maker. Also *Swift v Whitney* 20 Ill. 145; middle of the page, and near the bottom.

And *Bank of the U. States v Moss* 6 How. 36-38; also on notes, by indorsees vs maker; and cases cited. Also especially 2 Green. Evid. § 197 and *North Bank v Abbott* 13 Pick. 469-70.

All that is necessary is that the contract be fully executed on the part of the plaintiff. II Green. Evid. § 104

The practice of the profession generally is to add the

money counts in declaring against the indorser.

There can be no danger of surprise upon either party by thus pleading for by our statute a copy of the notes must be appended to the declaration and the defendant knows that they will be offered in evidence, and in addition, proof of a former suit, or of insolvency, or both in most cases.

Nor is there any injustice in this rule. The defendant has always the same defence against the note, when offered under the money counts, as when offered under the special counts. II Green Evid. § 112 note 2

And, if he had seen fit to offer that evidence, it must have been admitted - the presumption is that it was so admitted. *Warner v. Crane* 20 Ill. 222. But having neglected to offer such evidence then, it would be most inequitable to admit it now. If the defendant had introduced such evidence on the trial, the plaintiffs could and would have offered rebutting evidence. They had, only a short time before, sued out another execution against the maker, in a former suit; this execution had remained in the sheriff's hands the full ninety days, and had been returned "nulla bona". They had every reason to believe, and did believe the maker to be to-

*Warner v.
Crane 20 Ill.
p. 151 at the
bottom.*

=tally insolvent. The only reason why they brought suit at all was because of the difficulty of proving insolvency, even when it exists beyond all reasonable doubt.

Finally, the appellant has not assigned any defect in the declaration for error - consequently this court will not inquire into the question whether there be such defect or not.

Gilbert v. Haggard 1 Scam. 471.

What error then can be found in this case to call for the guardian interposition of this court? The only possible ground of relief is that the court below erred in refusing a new trial. But this ground is clearly untenable. The verdict so far from being contrary to the evidence is in entire harmony with it. If a new trial were granted, and the same evidence offered, the jury would be bound to find a verdict for the plaintiffs. And certainly a new trial will not be granted to allow the defendant to introduce new evidence, which he was at perfect liberty to offer at the first trial.

This court has decided repeatedly that a new trial will not be granted on the

ground of the verdict being against evidence, unless in cases of manifest error and injustice. And in this case no one pretends that the verdict was against evidence. All the evidence went to prove insolvency.

"And when the evidence conduces to prove a fact, it is competent in law to establish it, and upon a writ of error this court can revise the evidence only to ascertain whether it was thus competent in point of law. Whether the jury drew from it the correct inference in point of fact, cannot be here considered." *Hepburn v. Dubois* 12 Pet. 345.

The whole case may be summed up as follows
The errors assigned are five in number. As to the
two first, it is enough to say, that, the appellant,
not having excepted to the judgment of the
lower court on either of the denunciations, is preclud-
ed from relying upon that point now.

As to the third, there is not the slightest ground
to support it. The ninth of December was in
fact in the November Term, and so the verdict
was bound. If the appellant had shown that
it was not in that term, there would have
been a variance, but he did not show this,
nor could he show it. If he thought the fact,
that this day belonged to the November term, not

sufficiently proved, he should have objected on the trial, when the deficiency, if any, could have been easily supplied.

The fourth and fifth assignments of error are substantially the same; since, if the evidence did warrant the recovery, there was clearly no ground for demanding a new trial.

And that the evidence was sufficient to warrant the recovery, seems beyond all dispute. The evidence was all on one side, and all tended to show insolvency.

The special count was sufficient after verdict to admit that evidence. The common counts were sufficient, either before or after.

And if the declaration was insufficient, still there is no question as to that before this court; for, in the first place, the appellant, by abandoning his demurrer, has admitted its insufficiency, and, in the second place, he has not assigned any defect in it for error.

Then, as to the merits of the case, if the defendant should obtain a new trial, he would still only be restored to the same position he held before. Unless he offered more evidence, the jury would still be obliged to render the same verdict, and that evidence might as well have been offered before. To grant him a new trial

al to enable him to introduce evidence which was
thing but his own negligence prevented him
from introducing before could not of course
be thought of.

If he had offered such evidence, the plaintiffs
had other evidence to rebut it. They had no doubt
of the maker's involvement - it was that upon which
they had all the time relied. They supposed they had
proved it sufficiently, and had every reason to
suppose they so.

As the plaintiffs then have proved everything
they would have been obliged to prove under
the most formal pleadings, and as the defend-
ant enjoyed every advantage under the issue
actually tried ^{that he} ~~as they~~ could make any other,
it is hard to discover any injustice in this case
as here presented.

It is possible that the Circuit Court erred
in sustaining the plaintiffs' demurrer to the
defendants' third plea - for if there really had been
fraud in the return of the sheriff, the defendant
perhaps would have been allowed to contradict
it; but the fraud could have been shown as
well under the general issue, supposing that
there was any; or if not, as the defendant did
not see fit to except to that decision, we
have no concern with it now. The utter impos-
sibility of sustaining that plea, however, by proof,
probably made him less strenuous in its defence.

All which is respectfully submitted
George Payson
Counsel for Appellees

Supreme Court of Illinois.

HAMLIN
vs.
REYNOLDS, ET AL. } *Brief of Appellees.*

I.

No question is before this court upon demurrer.

For, first : No exception was taken to the judgment of the Circuit Court in overruling or sustaining the demurrers. Of course the appellant cannot assign those decisions for error now. *Hill vs. Ward*, 2 Gil. 293.

Second—The appellant, by pleading over, abandoned his demurrer. *Snyder vs. Gaither*, 2 Scam., 92.

Third.—The verdict on the whole declaration made the issues presented by the demurrer immaterial. *Warner vs. Crane*, 20 Ill., 151 ; *Townshend vs. Jemison*, 7 How., 706.

II.

There is no variance between the declaration and the evidence.

The most that can be said is, that the proof is not so full as it might have been. But no objection was made on the trial, when it could easily have been removed, and cannot be made now. *Harmon vs. Thornton*, 2 Scam., 455 ; *Gillhan vs. State Bank*, Ib., 247.

III.

The evidence was abundantly sufficient to sustain the verdict.

First—The sheriff's return is conclusive between third parties. *Lewis vs. Blair*, 1 N. H., 68 ; *Harkness vs. Farley*, 11 Maine, 493-4 ; *Crag vs. Fessenden*, 21 Ib., 34 ; *Bamford vs. Melvin*, 7 Ib., 18, 21 ; *McKeen vs. Gammon*, 33 Ib., 190-1 ; *Bott vs. Burnell*, 9 Mass., 98, 11 Ib. 165 ; *Estabrook vs. Hapgood*, 10 Ib., 314, 4 Mass. 478.

We have, then, admitted or proved, judgment against the maker at the first possible term, execution issued without unreasonable delay, and returned, after forty-three days, "nulla bona."

Second—This is evidence of due diligence under the statute.

Construction of the statute in other states. *Bank of United States vs. Tyler*, 4 Pet. 366.

Construction in Illinois. *Bestor vs. Walker*, 4 Gil., 14 ; *Pierce vs. Short*, 14 Ill., 146 ; *Bledsoe vs. Graves*, 4 Scam., 386 ; *Cowles vs. Litchfield*, 2 Scam., 356 ; *Clifford vs. Keating*, 3 Scam., 254.

Bail. *Stevens vs. Bigelow*, 12 Mass., 435.

Third—The facts proved are evidence of insolvency. *Bestor vs. Walker*, 4 Gil., 12, 13 ; *Harkness vs. Farley*, 11 Maine. 493-4.

IV.

The declaration.

First—The special count is sufficient, after verdict, to admit evidence of insolvency. 1 Chitty 673.

Second—The common counts are enough to sustain the verdict. *Snyder vs. Gaither*, 3 Scam. 91; *Townshend vs. Jemison*, 7 How. 724; 1 Chitty, 341, note 1; *Lane vs. Adams*, 19 Ill., 167; *Bank of United States vs. Moss*, 6 How., 36, 38; *North Bank vs. Abbott*, 13 Pic., 469-70; 2 Green. Ev., § 104, 112, and note 2; *Warner vs. Crane*, 20 Ill., 151; *Anderson vs. Sample*, 2 Gil. 458. *20 Ill. 145*.

Third—The appellant, by abandoning his demurrer, has admitted the sufficiency of the declaration. *Russell vs. Whiteside*, 4 Scam., 12; *Harmon vs. Thornton*, 2 Scam., 354-5. *1 Scam. 152*.

Fourth—The appellant has not assigned any defect in the declaration for error; hence this court will not inquire whether there be any error. *Gilbert vs. Maggord*, 1 Scam., 471.

V.

The only question then before the court is as to the sufficiency of the evidence. And as to this it seems there can be no doubt, as the evidence certainly is enough to make out a prima facie case of insolvency, and there is none to rebut it. *Hepburn vs. Dubois*. 12 Pet. 345.

VI.

A new trial will not be granted, on account of the verdict being contrary to the evidence, unless in cases of gross injustice. *Wheeler vs. Shields*, 2 Scam., 350; 1 Gil. 84; 5 Gil. 72; 1 Gil. 475.

But there was here no injustice, as the appellant might easily have offered his evidence, if he had any, under the general issue. And the presumption is that it was so admitted. *Warner vs. Crane*, 20 Ill., 151.

GEORGE PAYSON,
Counsel for Appellees.

Hanlin

vs

Reynolds
et al

Appellees Brief

Filed Apr. 26. 1889
Helen
Ch.

Prepared

Supreme Court of Illinois.

HAMLIN
vs.
REYNOLDS, ET AL. } *Brief of Appellees.*

I.

No question is before this court upon demurrer.

For, first : No exception was taken to the judgment of the Circuit Court in overruling or sustaining the demurrers. Of course the appellant cannot assign those decisions for error now. *Hill vs. Ward*, 2 Gil. 293.

Second—The appellant, by pleading over, abandoned his demurrer. *Snyder vs. Gaither*, 2 Scam., 92.

Third.—The verdict on the whole declaration made the issues presented by the demurrer immaterial. *Warner vs. Crane*, 20 Ill., 151 ; *Townshend vs. Jemison*, 7 How., 706.

II.

There is no variance between the declaration and the evidence.

The most that can be said is, that the proof is not so full as it might have been. But no objection was made on the trial, when it could easily have been removed, and cannot be made now. *Harmon vs. Thornton*, 2 Scam., 455 ; *Gillhan vs. State Bank*, Ib., 247.

III.

The evidence was abundantly sufficient to sustain the verdict.

First—The sheriff's return is conclusive between third parties. *Lewis vs. Blair*, 1 N. H., 68 ; *Harkness vs. Farley*, 11 Maine, 493-4 ; *Crag vs. Fessenden*, 21 Ib., 34 ; *Bamford vs. Melvin*, 7 Ib., 18, 21 ; *McKeen vs. Gammon*, 33 Ib., 190-1 ; *Bott vs. Burnell*, 9 Mass., 98, 11 Ib. 165 ; *Estabrook vs. Hapgood*, 10 Ib., 314, 4 Mass. 478.

We have, then, admitted or proved, judgment against the maker at the first possible term, execution issued without unreasonable delay, and returned, after forty-three days, "nulla bona."

Second—This is evidence of due diligence under the statute.

Construction of the statute in other states. *Bank of United States vs. Tyler*, 4 Pet. 366.

Construction in Illinois. *Bestor vs. Walker*, 4 Gil., 14 ; *Pierce vs. Short*, 14 Ill., 146 ; *Bledsoe vs. Graves*, 4 Scam., 386 ; *Cowles vs. Litchfield*, 2 Scam., 356 ; *Clifford vs. Keating*, 3 Scam., 254.

Bail. *Stevens vs. Bigelow*, 12 Mass., 435.

Third—The facts proved are evidence of insolvency. *Bestor vs. Walker*, 4 Gil., 12, 13 ; *Harkness vs. Farley*, 11 Maine. 493-4.

IV.

The declaration.

First—The special count is sufficient, after verdict, to admit evidence of insolvency. 1 Chitty 673.

Second—The common counts are enough to sustain the verdict. *Snyder vs. Gaither*, 3 Scam. 91; *Townshend vs. Jemison*, 7 How. 724; 1 Chitty, 341, note 1; *Lane vs. Adams*, 19 Ill., 167; *Bank of United States vs. Moss*, 6 How., 36, 38; *North Bank vs. Abbott*, 13 Pic., 469-70; 2 Green. Ev., § 104, 112, and note 2; *Warner vs. Crane*, 20 Ill., 151; *Anderson vs. Semple*, 2 Gil. 458. *20 Ill. 145.*

Third—The appellant, by abandoning his demurrer, has admitted the sufficiency of the declaration. *Russell vs. Whiteside*, 4 Scam., 12; *Harmon vs. Thornton*, 2 Scam., 354-5. / *Scam. 52*

Fourth—The appellant has not assigned any defect in the declaration for error; hence this court will not inquire whether there be any error. *Gilbert vs. Maggord*, 1 Scam., 471.

V.

The only question then before the court is as to the sufficiency of the evidence. And as to this it seems there can be no doubt, as the evidence certainly is enough to make out a prima facie case of insolvency, and there is none to rebut it. *Hepburn vs. Dubois*. 12 Pet. 345.

VI.

A new trial will not be granted, on account of the verdict being contrary to the evidence, unless in cases of gross injustice. *Wheeler vs. Shields*, 2 Scam., 350; 1 Gil. 84; 5 Gil. 72; 1 Gil. 475.

But there was here no injustice, as the appellant might easily have offered his evidence, if he had any, under the general issue. And the presumption is that it was so admitted. *Warner vs. Crane*, 20 Ill., 151.

GEORGE PAYSON,
Counsel for Appellees.

Hamlin
v
Reynolds
et al

Filed Apr 26, 1859
L. Leland
Clerk